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Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

Application of Pier Eleven Condominium
Association for a Permit to Extend a Pier on the
Bed of Green Lake, City of Green Lake, Green
Lake County

Case No.: 3-NE-97-232

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Pursuant to due notice hearing was held on July 21-22, 1998, at Green Lake, Wisconsin, Jeffrey D. Boldt, administrative law judge (ALJ) presiding. The parties requested the opportunity to submit written closing arguments, and the last brief was received on August 18, 1998.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Wisconsin Department of Natural Resources, by

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FINDINGS OF FACT

1. Pier Eleven Condominium Association (Pier Eleven or the Association), c/o Edward Brown, 425 Lake Street, Green Lake, Wisconsin, completed filing an application with the Department for a permit under sec. 30.12, Stats., to extend an existing pier on the bed of Big Green Lake (Green Lake), City of Green Lake, Green Lake County. The Department and the applicants have fulfilled all procedural requirements of secs. 30.12 and 30.02, Stats.

2. The applicants own real property located in the SE ¼ of the SW ¼ in Section 21, Township 16 North, Range 13 East, Green Lake County. The above-described property abuts Green Lake which is navigable in fact at the project site.

3. The applicants propose to construct an extension to their existing pier on the bed of Green Lake. The T-shaped addition would extend 40 feet further into the waters of the Dartford Bay area in the City of Green Lake. There would be six 21-foot by 2-foot finger piers along the forty-foot extension. The extension would be approximately 43 feet long and 76 feet wide.

4. The purpose is to provide boat mooring facilities to residents of a new building of condominium units built at the site. All boats are proposed to be moored by condominium unit owners and no moorings would be provided to the general public.

5. Pier Eleven owns approximately 219 feet of riparian frontage. The Association currently places a pier which extends 145 feet into Green Lake and provides mooring space for ten boats. A new building (phase two) was recently completed, which added six new condominium units at the site. There are now a total of 15 condominium units in the Pier Eleven complex. The applicants hope to place one mooring slip for each resident, plus keep one additional slip available for guests.

6. A pier permit is required because the placement of sixteen boat slips would have a detrimental impact upon public rights in navigable waters.

Stipulated Facts

The parties stipulated to the following nine Findings of Fact.

7. The Pier Eleven pier extension project is located on the northeast side (also called "east side") of Dartford Bay.

8. The shoreline around the northeast side of Dartford Bay is highly-developed and includes numerous multi-slip piers.

9. No pierhead line has been established in Dartford Bay.

10. The DNR Pier Guidance was issued in 1991 and is not a formally promulgated administrative rule.

11. The proposed pier extension will not cause a reduction of the flood flow capacity of Big Green Lake.

12. The proposed pier extension will allow the free flow of water and will not cause a build-up of land upon the bed of the lake.

13. The pier extension will not interfere with the riparian rights of neighboring property owners.

14. The project is a Type III action which does not require a formal environmental impact assessment.

15. A permit for a new pier was issued in 1997 to Green Lake Venture to construct a new pier in Dartford Bay approximately one to two city blocks away from the Pier Eleven Condominium site.

16. A permit was issued in 1995 allowing Green Lake Marina to expand and reconfigure its facilities in Dartford Bay from 76 slips to 88 slips.

Additional Findings

17. The proposed pier expansion will not be a material obstruction to navigation. The northeast side of Dartford Bay is a shallow area outside the usual pattern of navigation on Green Lake. The usual pattern of boating traffic follows a buoy-marked channel out of the Bay into the main body of Green Lake. Fishing boats do frequent the area. However, the proposed pier expansion will not materially obstruct their ability to navigate in the Bay.

18. The proposed project exceeds the "reasonable use" of the riparian parcel owned by the applicant. Department staff make use of a guidance document which attempts to apply complex common law principles on a consistent, but site-specific, basis statewide. Riparian rights must be balanced against the rights of the public in protecting and preserving public waters. The riparian's use of its property must be reasonable. The guidance sets a presumption of reasonable use at two slips for the first fifty feet of riparian frontage and one additional slip for each additional fifty feet of shoreline frontage owned. (Ex. 60; Accord, Sterlingworth, at p.731) The guidance allows the DNR staff flexibility based upon site-specific public interest factors.

Further, multiple owner lots, including condominiums, are not entitled to greater berthing privileges than their shoreline frontage would otherwise provide (Ex. 60, p.3) Finally, the DNR allows facilities that provide public mooring of boats a greater number of slips, so long as site conditions do not harm public interest in the waters, than those which are reserved solely for use by the private riparian. (Id., p.4)

Strictly applying the guidance to the project site, a "threshold" reasonable use of the property would involve placement of no more than five slips. (Nelson) The existing 10-slip pier already involves placement of a pier which doubles the threshold formula for a reasonable use of a riparian parcel.

Unlike other large piers in the area, the proposed expansion provides no public benefit in the form of rental slips made available to the public for seasonal rental. (Ex. 70) None of the proposed six additional slips would be made available to the public. Both the Green Lake Venture and the Green Lake Marina permits cited by the parties in the stipulated facts provided a significant portion of approved slips to non-riparian members of the public through rental of boat slips. In the instant case, placement of sixteen boat slips for use solely by the riparian owners would exceed the reasonable use of 219 feet of riparian frontage.

19. The proposed pier expansion would have a detrimental impact upon the public interest in maintaining a diverse aquatic plant community at the project site. There is currently a rich community of emergent, submergent and floating-leaf plants in and around the proposed expansion footprint. (Exs. 77 and 85-86) The vegetated near-shore area of the lake, or littoral zone, is the most environmentally significant area of a lake and provides important habitat for a variety of plants, fish and critters. (Ex. 72) DNR Water Resources Specialist, Mark Sesing, testified that piers shade aquatic plants to a significant degree, totally inhibiting plant growth. (Ex. 77; 91-92) Further, additional boat-mooring and traffic will reduce plant growth by scouring sediment and direct cutting. (Ex. 78) Sesing convincingly demonstrated by underwater photographs and examination that habitat beneath the existing Association pier was relatively sterile and devoid of rooted plants and desirable fish species. The only plants observed directly under the existing pier were algae attached to pier supports; the principal fish making use of the area were carp. (Id.) There is no question that further expansion of the existing pier would have a detrimental impact on aquatic vegetation in a small area in and around the project site.

20. There is extensive weed cutting and harvesting on Green Lake. Weed harvesting was set up by the Green Lake Association, a party to this proceeding which opposes pier expansion. While the weed harvesting involves many of the same plants threatened by the pier expansion, there are two significant differences. First, the plants in the proposed area represent a natural and interactive community of aquatic plants and associated invertebrate fauna and microfauna. Indeed, the project site has been identified by the DNR as a "sensitive area" due to the valuable assemblage of plants and related fish habitat values at the site. The existing plant community plainly serves as important public resource supporting fish values. Further, weed harvesting does not involve floating leaf plants such as water lilies, which are especially vulnerable to piers and boat traffic. (See: Ex. 82) Second, unlike weed harvesting, which cuts weeds similar to the way a lawn is mowed, boating traffic and pier placement eliminates plant growth down to the very roots of the plants.

21. Dartford Bay is a critical habitat area for spawning and nursery activity of largemouth bass, bluegill and walleye. This fact, well-known to local anglers, was demonstrated by DNR fishery surveys conducted in 1994, 1995 and 1998 (Exs. 102-111) DNR Fisheries Biologist David Bartz testified that it was likely that largemouth bass utilize the proposed project area for spawning. Further, bluegill and other fish species make use of the proposed area for cover and feeding activity. Bartz opined that there is a direct relationship between a lack of lake vegetation and the proliferation of carp. Further, it was likely that carp would make use of the area under the proposed project if the pier were constructed, because the shading caused by the pier would reduce or eliminate aquatic vegetation in the footprint of the expansion.

The proposed pier expansion would have a detrimental impact on the public interest in maintaining the fishery values in Green Lake. The reduction in aquatic vegetation would have a detrimental impact on the life cycle of desirable fish species, and would benefit undesirable species such as carp. (Bartz)

22. The proposed project would result in detrimental cumulative impacts to the public interest in Dartford Bay and Green Lake. There is nothing "speculative", as the applicant suggests, about the proliferation of piers on Green Lake. As Warden Alsteen testified, a comparison of aerial photographs in the area from 1985 to 1998 demonstrates the increased numbers of structures on Dartford Bay. (See: Ex. 47 and Ex. 2) The number of slips in Dartford Bay, as reflected on such photographs, has almost doubled over that period. (Ex. 43)

The testimony of Mr. Sesting is particularly germane to the issue of the cumulative impacts of excessive placement of pier structures by riparians. When the Department staff took underwater photographs, they were surprised by the sterile conditions under the existing pier, especially given the lush growth immediately around it. Carp proliferate in such a sterile, mucky setting. Desirable fish species suffer from the lack of food, lack of cover and from competition from carp. This is a detrimental impact to the waters held for the public trust. One small sterile, carp-laden area in Dartford Bay may appear inconsequential, but given the clear proof of the increasing numbers of piers, it is the duty of the DNR to see the whole lake and not just the small part of it that would be damaged by this project. The applicants already have a pier that is extensive and large relative to its 219 feet of riparian frontage. To expand it further could set a precedent that would result in detrimental cumulative impacts to the public interest in preserving and protecting the waters of Green Lake. If every riparian owning 200 feet of riparian frontage placed 16 boat slips in an environmentally sensitive area, the cumulative impact on the littoral zone of the lake as a whole would be significant.

23. The proposed structure will not adversely affect water quality nor will it increase water pollution in Green Lake. The structure will not cause environmental pollution as defined in sec. 283.101(14), Stats., if the structure is build and maintained in accordance with this permit.

24. The Department of Natural Resources has complied with the procedural requirements of sec. 1.11, Stats., and Chapter NR 150, Wis. Admin. Code, regarding assessment of environmental impact.

DISCUSSION

As noted by the Wisconsin Court of Appeals: "The DNR must evaluate many pier projects around the state. To aid field staff in determining when pier projects have an impact on public rights in navigable waters, the Department has created the informal program guidance to apply complex common law principles to individual project sites. The guide sets a presumption of 'reasonable use' at two mooring spaces at a pier for the first fifty feet or lesser amount of shoreline and one more space for each additional fifty feet of shoreline in common ownership. However, DNR employees are to consider whether other statutory criteria . . . or other public interest factors, i.e., critical habitat, would impose greater restrictions on construction and placement before applying this formula. . . . The DNR's informal guidelines reconcile the common law "reasonable use" doctrine with the statutory limitations on a riparian owner's right to the use of a navigable water. Both presume "reasonable use" by riparians, but allow for variations based on value and policy considerations." Sterlingworth, Supra, pp. 730-731. In the instant case, the balancing of public rights with the rights of the applicant indicate that any further expansion of its pier would violate the "reasonable use" of its riparian parcel.

The applicant makes repeated references to the Green Lake Venture project as somehow justifying expansion of the existing Pier 11 pier. If anything, that project demonstrates precisely how impacts to an area of the lake can be cumulative, each small area of habitat lost adding up to a sum greater than its parts. Further, unlike the instant application, the Green Lake Venture permit specifically provided that all slips over the presumptive "threshold" reasonable use number (7, in that case, five in the instant case) be made available for public rental.

The applicant also argues that other riparians have much heavier density of use. This again demonstrates the need for some notion of the "reasonable use" of riparian frontage, to ensure that public trust waters are not detrimentally impacted by the unreasonable placement of excessive numbers of piers by private riparians. The Department of Natural Resources is charged by the legislature to preserve and protect the public waters of the state from such a fate.

The Wisconsin Supreme Court has required that the Department consider the cumulative impact of many small projects on the resource as a whole. In Hixon v. PSC, the Wisconsin Supreme Court noted:

A little fill here and there may seem to be nothing to become excited about. But one fill, though comparatively inconsequential, may lead to another, and another, and before long a great body of water may be eaten away until it may no longer exist. Our navigable waters are a precious natural heritage; once gone they disappear forever....Hixon v. PSC, 32 Wis. 2d 710, 721-722, 556 N.W.2d 79 (1966)

In Sterlingworth, the Wisconsin Court of Appeals specifically applied Hixon to placement of pier slips:

Although nine additional boat slips may seem inconsequential to a proprietor such as Sterlingworth, we approach it differently. Whether it is one, nine or ninety boat slips, each slip allows one more boat which inevitably risks further damage to the environment

and impairs the public's interest in the lakes. The potential ecological impacts include direct impacts on water quality and sediment quality alteration, as well as direct and indirect influences on flora and fauna. For this very reason, the consideration of "cumulative impact" must be taken into account. Sterlingworth, Supra, p. 721

The proposed expansion of the Pier Eleven pier is in an area of Dartford Bay that the DNR has designated as environmentally "sensitive" due to its diverse plant community and related fishery habitat values. It is also in an area, as the parties stipulated, that is "highly-developed" and which includes numerous multi-slip piers. The record demonstrated how the number of pier slips has grown in recent years. The DNR would be derelict in its legal obligations to protect and preserve the public waters if it did not consider the "cumulative impact" of many such small projects under these circumstances.

CONCLUSION OF LAW

1. The Division of Hearings and Appeals has authority under secs. 30.12 and 227.43(1)(b), Stats., and in accordance with the foregoing Findings of Fact, to issue a permit for the construction and maintenance of said structure subject to the conditions specified.

2. The applicants are riparian owners within the meaning of sec. 30.12, Stats.

3. The proposed facility described in the Findings of Fact constitutes a structure within the meaning of sec. 30.12, Stats.

4. The proposed project would be "detrimental to the public interest in navigable waters" within the meaning of sec. 30.12(2), Stats.

5. The public trust doctrine protects the public interest in navigable waters, including the interest in maintaining a high-quality fishery for recreational purposes. Muench v. PSC, 261 Wis. 492, 501-502, 53 N.W.2d 514 (1952). The public trust duty requires the state not only to promote navigation but also to protect and preserve its waters for fishing, hunting, recreation and scenic beauty. WED, Inc. v. DNR, 85 Wis. 2d 518, 526, 271 N.W.2d 69 (1978). The proposed project would be detrimental to the public interest in maintaining fish spawning habitat and aquatic plants.

6. Specific structures may be determined to be "detrimental to the public interest" within the meaning of sec. 30.12(2), Stats., on the ground that they impair natural beauty. This is a proper basis for denial of a permit. Clafin v. DNR, 58 Wis. 2d 182, 206 N.W.2d 392 (1973). The proposed project would not be detrimental to the public interest in natural scenic beauty.

7. The applicant for a Chapter 30, Stats., permit has the burden of proof that the project will meet the standards in sec. 30.12(2), Stats., Village of Menomonee Falls v. DNR, 140 Wis. 2d 579, 605, 412 N.W.2d 505 (Wis. Ct. App. 1987). The applicant has not carried its burden of showing that the proposed project would be not detrimental to the public interest in navigable waters.

8. The rights of a riparian must be balanced with the public rights in the navigable waters of the state. A riparian's use of a riparian property must be "reasonable." The reasonable use of a riparian property is related to factors specific to pier placement, including the amount of riparian frontage and the historic use of the property, and not to the number of condominium units that are built in upland areas away from the public trust waters. Sterlingworth, Id., p. 731.

9. The DNR must consider the "cumulative impact" of many small pier slip projects on a lake as a whole in carrying out its legislatively assigned duty in protecting the navigable waters of the state. Sterlingworth Condominium Assoc. v. DNR, 205 Wis. 2d 710, 721-722, 556 N.W.2d 791 (Wis. Ct. App. 1996). Accord: Hixon v. PSC, 32 Wis. 2d 608, 631-32, 146 N.W.2d 577, 589 (1966).

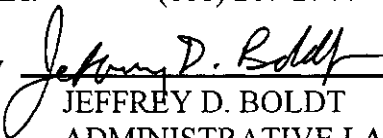
10. The project is a type III action under sec. NR 150.03(8)(f)4, Wis. Admin. Code. Type III actions do not require the preparation of a formal environmental impact assessment.

ORDER

WHEREFORE, in accordance with the foregoing Findings of Fact, IT IS HEREBY ORDERED, that the application for a pier extension be DENIED.

Dated at Madison, Wisconsin on September 28, 1998.

STATE OF WISCONSIN
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By _____
JEFFREY D. BOLDT
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.